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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GARY L. HEIMAN

Appeal 2009-009257
Application 10/696,683
Technology Center 1700

Before MICHAEL P. COLAIANNI, KAREN M. HASTINGS, and
JEFFREY B. ROBERTSON, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING¹

This is in response to a Request for Rehearing, filed May 17, 2010, for rehearing of our Decision, decided March 17, 2010, wherein we sustained the Examiner's rejections (1), (2), and (5) and vacated the Examiner's cumulative rejections (3) and (4).

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

With respect to rejection (1), we begin by noting that claim 1 recites "[a] woven fabric sheeting, comprising . . . at least one of the warp yarns being a spun yarn of natural fibers."

Appellant argues that "[c]laim 1 specifically requires a woven fabric that comprises, in part, at least one warp yarn being a spun yarn of natural fibers . . . In other words, at least one warp yarn is made solely of natural fibers." (Request 2). Appellant argues that "[a]t most, the claim can be read as having yarns that are or include synthetic fibers, but must still have at least one yarn that does not, i.e., at least one of the warp yarns must be a spun yarn, the fiber of which are all natural." (Request 3).

Appellant also argues that "claim 1 expressly states that the fiber of at least one of the yarns must all be natural, which is directly at odds, and wholly undercuts, the conclusions stated by the Board." (Request 3).

In addition, Appellant argues that "there is no teaching in Love of a woven fabric having a spun yarn (let alone a spun warp yarn) made solely of natural fibers. At best, Love discloses a spun yarn that is a blend of natural and synthetic fibers, which is not a yarn solely of natural fibers." (Request 4).

While claim 1 encompasses embodiments where the spun yarn is composed of *only* natural fibers, the "at least one of the warp yarns being a spun yarn of natural fibers" limitation does not limit the spun yarn to being composed of *only* natural fibers. In this regard, Appellant's use of the term "being" does not preclude other, additional fibers different from natural fibers. In fact, in paragraph 8 of the Specification Appellant discloses that the floated yarns, which include warp and/or filling yarns, may be formed of "natural fibers, synthetic staple fibers and/or synthetic filaments." This

disclosure indicates that a fair construction of the disputed claim language includes warp yarns made of a blend of natural and synthetic fibers/filaments.

Indeed, as stated in our Decision,

Appellant's open-ended transitional claim language "comprising" in claims 1 and 33 does not exclude additional fibers, such as Love's synthetic fiber, as a component in its spun yarn. *Baxter*, 656 F.2d at 686-87. Therefore, it is immaterial whether Love teaches a synthetic fiber as a component in its spun yarn because Appellant has not limited the claims to require that the spun yarn be formed from only natural fibers.

(Decision 5).

With respect to rejection (5), Appellants argue that

the Decision assumes that one would substitute the 1x1 plain weave of Heiman with the twill weave, e.g., 2x1 pattern, of the Fairchild dictionary. . . . However, the converse is understood in the art. Specifically, a twill weave, e.g., a 2x1, is not as strong as a conventional 1x1 plain weave pattern . . . In support thereof, Appellant refers the Board to the Stewart Declaration.

(Request 4-5).

Appellants also argue that "as compared to a 1x1 plain weave pattern, it is . . . well known that a twill weave, e.g., a 2x1 pattern, is more expensive to produce and consequently sell . . . Again, in support thereof, Appellant refers the Board to the Stewart Declaration." (Request 5). Appellant also argues that the substitution "directly contradicts the sole objective of Heiman, which is . . . to provide an improved, fabric sheeting . . . in a fashion that reduces the acquisition cost of sheeting and bed linens and other products made therefrom." (Request 6).

These arguments are raised for the first time in the Request. Indeed, as stated in our Decision,

Appellant does not specifically dispute the Examiner's determination that 'it would have been obvious to one having ordinary skill in the art to substitute a 2/1 twill weave for the plain weave structure disclosed by [claims 1-21 of] Heiman since twill weaves are a commonly known weave structure *which is known to produce a strong, durable fabric.*' (Decision 13) (emphasis added).

Because such new arguments are not made regarding a "recent relevant decision of either the Board or a Federal Court" or in response to a new ground of rejection under 37 C.F.R. § 41.50(b), Appellant's newly advanced arguments have not been considered. 37 C.F.R. § 41.52 (2009).

In addition, with respect to the Stewart Declaration, because this Declaration evidence was not previously relied upon in the Briefs, the Stewart Declaration is new evidence which we shall not consider. 37 C.F.R. § 41.52 (2009) (stating, in part, that "evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) and (a)(3) of this section.")

The Request for Rehearing is granted to the extent that we have reconsidered our Decision but is denied as to the request to modify our Decision.

DENIED

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Application 10/696,683

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